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No. 94-1796

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Supreme Court of the United States
OCTOBER TERM, 1995

ALBERTSON'S, INC.,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America supports the Petitioner with respect to Question No. 1 as presented in the Petition: Whether Section 404

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[1] This brief is filed with the written consent of the parties pursuant to Rule 37.3 of this Court's Rules. Letters of consent are being filed simultaneously with the Clerk.

of the Internal Revenue Code bars the current deduction of interest accrued under a nonqualified deferred compensation plan.

The Chamber is a federation of approximately 215,000 companies and several thousand other organizations such as state and local chambers of commerce and trade and professional organizations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the Congress, and the Executive Branch of the federal government. The Chamber has sought to advance those interests by filing briefs *amicus curiae* in many cases involving federal income taxation, including *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979) and *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984).

This case presents an important issue of proper interpretation of statutes enacted by Congress—particularly the income tax laws. The Ninth Circuit imposed what it recognized was a non-literal reading of the Internal Revenue Code provisions relating to nonqualified deferred compensation plans. It held that despite statutory language allowing interest accrued under a nonqualified plan to be deducted at the time it accrues, the court would impose a rule allowing deduction only later, when the deferred compensation is actually paid.[2] This non-literal

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[2] Under qualified plans, employers make contributions to trusts (or other investment vehicles) set up by the plan. The contributions are tax deductible to the employer, and neither the contributions themselves nor income those contributions earn in the trust is taxable to the employee until distributed to the employee, generally during retirement. To qualify, a plan must meet exacting criteria, including minimum vesting requirements, prohibition against self-dealing, nondiscrimination in favor of highly paid employees, and others. IRC § 401 (1988); *see* BORIS I. BITTKER

interpretation is not supported by legislative history, but only by the court's version of federal tax policy. The Chamber supports a grant of certiorari because its members generally are subject to federal taxation and need to be able to comprehend the provisions of the tax laws and to make plans and decisions on that basis. Court decisions subjecting taxpayers to non-literal construction of those laws are highly disruptive of those desirable goals. Moreover, many of the Chamber's members use qualified and nonqualified deferred compensation plans, and the Ninth Circuit's holding creates a significant impediment to the usefulness of nonqualified plans to provide for pensions and other forms of deferred compensation for their employees.

REASONS FOR GRANTING CERTIORARI

This brief is addressed solely to the first question presented in the Petition and adopts the statement of the case and the reasons for granting certiorari as stated in the Petition with respect to Question No. 1. That question is an important one deserving review by this Court because of the revenue involved, the widespread use of nonqualified plans, and the severe shortcomings of the Ninth Circuit's approach to statutory construction.

This case presents an important opportunity to consider when it is appropriate for a court to read a statute to

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& LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶¶ 61.1.1, 61.2 (2d ed. 1990).

Nonqualified plans include any deferred compensation plan that does not meet one or more of the requirements of a qualified plan. IRC § 404(a) governs the deductibility of employer contributions to a nonqualified plan. As Professor Bittker points out, while "compensation is ordinarily deductible by an employer using the accrual method when it is earned and the liability arises, Section 404(a) is a "departure from the customary rules of accrual accounting," and under that section the sums paid in compensation are not deductible until actually paid to the employee. BITTKER & LOKKEN, *supra*, ¶ 60.2.2, at p. 60-15. *See* Pet. 21.

impose a greater burden than the plain text of the statute would impose. This Court has held that the literal meaning of a statute must be the pre-eminent guide to its actual meaning and to an understanding of Congress's purpose in enacting it. *E.g., Ardestani v. INS*, 502 U.S. 129, 137 (1991). Policy considerations extraneous to the statutory terms "cannot override [a court's] interpretation of the text" unless such considerations show that a literal reading of the text "would lead to a result so bizarre that Congress could not have intended it." *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991) (internal quotation omitted). As Judge Easterbrook, speaking for the Seventh Circuit, has put it, "Provisions of the Internal Revenue Code do not conflict with 'tax policy' . . . . They are tax policy and are to be enforced." *Sears, Roebuck and Co. v. Commissioner*, 972 F.2d 858, 868 (7th Cir. 1992).

This Court's holdings appear not to have made any impression on the Ninth Circuit. That court readily recognized both in its original opinion and on rehearing that under the plain and literal text of the Internal Revenue Code accrued interest on the debt of future compensation is "interest" within the meaning of Section 163 and immediately deductible (Pet. App. 16a, 35a). Moreover, that court acknowledged that under a literal reading, a qualified plan provides a tax advantage over nonqualified plans, because under a qualified plan, the actual compenstion paid by the employer is immediately deductible, while under a nonqualified plan it is not deductible until it is actually paid to the employee. Pet. App. 14a. Even as calculated by the Ninth Circuit (which sought to minimize the advantage),[3] this is undeniably a signifi-

[3] The Ninth Circuit calculated that compared to the 100 per cent of the "deferred compensation package" (i.e., actual compensation plus interest) that is deductible by the employer or not chargeable as income to the employer or employee under a qualified plan, only 70 per cent (i.e., interest alone) is deductible to the employer using a nonqualified plan under the facts of this case, which included the

cant tax benefit favoring use of qualified versus nonqualified plans.

An analysis of such factors should have ended the matter for a reviewing court. Under the plain and literal statutory language Congress gave a valuable but not unlimited incentive toward the use of qualified plans. That the incentive is not stronger is not "bizarre." It is a characteristic Congressional choice. Given the typical features of Congressional legislation—the leavening of moderation and compromise, the "balance[s] struck" (*Hallstrom v. Tillamook County*, 493 U.S. 20, 30 (1989), *reh'g denied*, 493 U.S. 1037 (1990)), and the multiple purposes of enactments (*see Toibb v. Radloff*, 501 U.S. 157, 163 (1991))—it is not even surprising. While Congress could have made the disincentive to use nonqualified plans greater, it could also have made it smaller—or provided none at all. It is not a court's role to rethink such legislative questions.

The Ninth Circuit also did not identify any legislative history to support its conclusion that the statute should not be given its plain and literal meaning.[4] In fact, that

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period of deferral for the employees at issue and an accrued interest rate "similar to that used by Albertson's", Pet. App. 14a, which rate the court of appeals had earlier found was "a direct reflection of what Albertson's would have paid on the open market in order to borrow such amounts." Pet. App. 29a-30a.

[4] The Ninth Circuit quoted part of a sentence from the Senate and House Reports favoring enactment of Section 404 stating that in a nonqualified plan if an employer defers payment of "compensation," the employer "will not be allowed a deduction until the year in which the compensation is paid." Pet. App. 11a, quoting from H.R. Rep. No. 2333 and S. Rep. No. 1631, 77th Cong., 2d Sess. (1942), *reprinted* in 1942-2 Cum. Bull. 372, 452, 504, 609. The court of appeals named this the "matching principle."

However, since Section 404 in terms applied that matching requirement only to compensation and not to interest, and since the legislative history did not suggest that this effect be extended beyond compensation itself, it cannot be said, and the Ninth Circuit did not hold, that allowing immediate deductibility of accrued inter-

court recognized in its earlier opinion that there was no pertinent legislative history. Pet. App. 35a. Instead, to support its view that the literal meaning was contrary to tax policy, the court of appeals advanced its own ideas of appropriate taxation, asserting that "it would make little sense" and "reduce the significance of the incentive structure of Section 404" to bar a current tax deduction for compensation in nonqualified plans without also deferring the deduction for interest accrued thereon. Pet. App. 15a, 14a. This misconceived the court's role. Even putting aside the question of whether it was proper to look further than the plain meaning of the statutory terms, "[w]hen . . . nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words . . . any further steps take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke*, 471 U.S. 84, 96 (1985).

Even though the Ninth Circuit asserted that the purpose that it attributed to Congress of favoring qualified plans would be "thwart[ed]" by the application of the statute's plain meaning, it did not cite any evidence or indication that this was in fact the case, and it appears unlikely that it was.[5]

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est would offend this so-called "principle." Instead the court held that it "would make little sense"—i.e., would offend the court's own sense of proper tax policy—not to *extend* the "principle" to accrued interest. Pet. App. 15a.

[5] For at least 14 years, from 1977 through 1991, one of the most widely read federal income tax services advised that accrued interest on the obligation to pay future compensation under a nonqualified plan was currently deductible. *See* 1977-1990 Stand. Fed. Tax Rep. (CCH) ¶ 2656A.25 and the 1991 edition at ¶ 2657N.056. If there had been a decline in qualified plans in favor of nonqualified plans during this period, that result would likely have been brought to the attention of the court of appeals. It was not. Moreover, since at least some employers use both qualified and nonqualified plans (*see* Arthur H. Kroll, *Deferred Compensation Agreements*, 385-3d Tax Mgmt. (BNA) at A-23 (1994)), it is

Finally, we note that at least as much as in any other area, there is a need in the administration of the law of taxation for statutes to mean what they plainly say. Although the Internal Revenue Code is very complex, yet it must apply throughout the economy of the United States. It must be read and applied by taxpayers in every walk of life and in every business. To the present practice of reading the Code closely to determine its meaning —difficult enough in view of its complexity and length of 1.3 million words—would be added a vague and uncertain process in which taxpayers and their advisers would be forced (1) to determine whether there was some policy that might cause the taxpayer to depart from the plain and literal meaning, (2) to define such a policy, (3) to decide whether the statute or the policy should control—and then (4) to await, for an extended period, a determination of whether the taxpayer had guessed correctly.[6] Recognition of the possibility that tax statutes might be read non-literally (even in the absence of any legislative history to support such a result) would make the taxpayer's obligation to comply with the law much more difficult and would injure or destroy the ability to plan for business transactions or personal decisions (such as retirement). Long-settled arrangements made in complete reliance on the plain meaning of the statutory text could be upset because, as here, a court later decided that the law should mean something other than what it says.

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possible that more favorable treatment for nonqualified plans would lead to greater use of such plans without any decline in the use of qualified plans.

[6] Presumably the government would not look favorably upon any departure from the plain meaning that favored the taxpayer.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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